Nos. 77-1546 and 78-303

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM H. STAFFORD, JR., ET AL., PETITIONERS

v.

JOHN BRIGGS, ET AL.

WILLIAM F. COLBY, ET AL., PETITIONERS

v.

RODNEY D. DRIVER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND FIRST CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the question whether the venue provisions of 28 U.S.C. 1391(e) apply to actions against federal officers or employees for money damages.[1]

[1] The petitions also present the question whether the Due Process Clause forbids a federal court to exercise personal jurisdiction over persons who do not have substantial "contacts" with the state in which the federal court sits. We do not discuss this matter at length because we agree with the courts of appeals that Section 1391(e) is not constitutionally infirm. See Stafford Pet. App. 14a-18a; Colby Pet. App. 18a-20a. Many federal statutes authorize nationwide jurisdiction. See, *e.g.*, 28 U.S.C. 1397, 2361 (interpleader); 15 U.S.C. 5, 25 (antitrust laws); 15 U.S.C. 78aa (securities laws). Other statutes allow federal administrative agencies, which sit only in the District of Columbia, to adjudicate the rights of persons anywhere in the nation. Petitioners' arguments would require at least some of these statutes to be declared invalid. But the courts of appeals properly held that *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), and similar cases hold only that the Due Process Clause requires certain minimum contacts between the defendant and the sovereign that has created the court. A sovereign cannot exercise coercive force over persons who have not, in some manner, subjected themselves to its authority. The United States, however, has an unquestioned right to exercise sovereign authority over petitioners. That it does so through one of its courts rather than another is of no concern under the analysis of *Shaffer*. See *Fitzsimmons* v. *Barton*, No. 78-1021 (7th Cir. Jan. 5, 1979), slip op. 5: "the 'fairness' standard imposed by *Shaffer* relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum." This Court frequently has held that courts that sit only in the District of Columbia—such as the Court of Claims—can exercise nationwide jurisdiction. See *United States* v. *Union Pacific R.R.*, 98 U.S. 569, 603-604 (1878); *Mississippi Publishing Corp.* v. *Murphee*, 326 U.S. 438, 442 (1946). See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-332 (1966). Because we conclude that 28 U.S.C. 1391(e) is not subject to substantial constitutional challenge, even if construed as the courts of appeals have construed it, we devote this brief to analysis of the proper interpretation of the statute.

INTEREST OF THE UNITED STATES

The United States is concerned that federal employees sued for damages because of acts that appear to have been performed within the scope of employment not be forced to defend their actions in inconvenient forums. Defending suits in such places burdens the United States in two ways.

First, with certain exceptions the Department of Justice either represents such employees through its own attorneys or pays private counsel to do so. See 28 C.F.R. 50.15 and 50.16. To the extent that litigation in inconvenient places increases the cost of that defense, the United States has a direct financial interest in the outcome of these cases.

Second, an employee who is forced to participate in litigation in places far removed from his official residence or from the place where the claim arose can devote less time and attention to the performance of his official duties while the litigation is in progress. As a defendant, he is subject to deposition and participation in other pre-trial matters where the court is located and must attend the trial itself. As the present cases demonstrate, litigation of this nature is lengthy (the complaints in these cases were filed in 1974 and 1975) and the incremental effect of an inconvenient forum is to detract

from the employee's performance of present duties. Such suits may be particularly burdensome after the employee has left government employment; it may be difficult for him to take leave from his private affairs in order to defend suits scattered throughout the nation. The prospect of such suits therefore may make it more difficult for the United States to attract able persons into public service.

STATUTES INVOLVED

28 U.S.C. 1391 provides in relevant part:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
>
> * * * * *
>
> (e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT

A. STAFFORD

In 1972 William Stafford, then United States Attorney for the Northern District of Florida, Stuart Carrouth, Assistant United States Attorney, and Claude Meadow, an FBI agent, conducted grand jury proceedings in Florida. Respondents were subpoenaed to appear before the grand jury. At the request of respondents' counsel, the district judge responsible for the proceedings ordered Guy Goodwin, an attorney employed by the Department of Justice

who was assisting petitioners in their investigation, to take the witness stand and testify under oath. The district judge asked Goodwin whether there were any "agents or informants" of the government among the witnesses represented by counsel. Goodwin replied that there were not (Stafford Pet. App. 2a).

Respondents brought this suit in the United States District Court for the District of Columbia against petitioners and Goodwin,[2] alleging that Goodwin's testimony was false and that it was part of a conspiracy among petitioners to deprive respondents of statutory and constitutional rights. Each respondent sought $50,000 in compensatory damages and $100,000 in punitive damages from petitioners and Goodwin.

Petitioners and Goodwin requested transfer of the action to the United States District Court for the Northern District of Florida; petitioners also requested, in the alternative, dismissal of the action on the ground that venue was not properly laid in the District of Columbia (Stafford Pet. App. 3a). The district court denied the motion to transfer (*id.* at 23a-24a) but granted the motion to dismiss (*id.* at 25a-26a).[3] The court then entered a separate judg-

[2] Petitioners were served by certified mail in Florida; Goodwin was served personally in the District of Columbia (Stafford Pet. App. 3a).

[3] Goodwin (but not petitioners) moved to dismiss the complaint against him on grounds of prosecutorial immunity. The district court denied the motion (Stafford Pet. App. 20a-23a), and the court of appeals affirmed (*Briggs* v. *Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978)).

ment under Fed. R. Civ. P. 54(b) dismissing the case against petitioners (*id.* at 27a).

On respondents' appeal, the court of appeals reversed (Stafford Pet. App. 1a-19a).[4] It held that 28 U.S.C. 1391(e) permits damages actions against federal officials to be brought in any district in which any defendant resides. Venue was proper here, it held, because Goodwin was a resident of the District of Columbia (Stafford Pet. App. 5a-12a). The court also held that Section 1391(e), as so interpreted, is constitutional because there is no need that any defendant have any "contacts" with the place in which a particular federal court sits (Stafford Pet. App. 14a-18a).

B. COLBY

From 1953 until 1973 the Central Intelligence Agency (CIA) opened and photographed, at Kennedy Airport in New York, a portion of the mail travelling between the United States and the Soviet Union.[5] Petitioner Walters was appointed Deputy Director of Central Intelligence in May 1972, and

[4] Goodwin did not seek review of the district court's order denying his motion to transfer. Because he did not join the motion to dismiss, the court of appeals did not consider on this appeal any issue concerning Goodwin. See also note 3, *supra*.

[5] See generally Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess. 559-677 (1976).

petitioner Colby was appointed Director of Central Intelligence in September 1973.

Respondents filed this action against petitioners and others [6] in the United States Court for the District of Rhode Island on behalf of themselves and others whose mail allegedly had been opened and read by CIA employees. Respondents alleged that the activities of petitioners and other defendants violated their constitutional rights, and they sought damages and declaratory and injunctive relief (Colby Pet. App. 2a). They contended that venue was proper in Rhode Island under 28 U.S.C. 1391(e) because one plaintiff lived there. Petitioners and other defendants were served by certified mail outside Rhode Island.

All of the defendants moved to dismiss the complaint for lack of personal jurisdiction, improper venue and insufficiency of process (Colby Pet. App. 22a). The district court denied the motion, holding that Section 1391(e) supplied both personal jurisdiction and venue (Colby Pet. App. 25a-33a), that it applied to damages actions against federal officials (*id.* at 33a-45a) and that it applied to persons who had left government service before the complaint was filed (*id.* at 46a-50a).[7] The district court then cer-

[6] See Colby Pet. 3 n.2.

[7] The district court also ruled on questions not germane to the issues presented in this Court. See Colby Pet. App. 51a-52a (specificity of allegations), 52a-53a (mootness), 54a-69a (purported class represented by named plaintiffs).

tified the case for an interlocutory appeal under 28 U.S.C. 1292(b) (Colby Pet. App. 53a, 70a-71a).

The court of appeals affirmed the denial of petitioners' motion to dismiss but reversed concerning the former employees (Colby Pet. App. 1a-20a).[8] It held that Section 1391(e) applies to damages actions against federal officials and employees in their individual capacities because they are within the literal language of the statute (Colby Pet. App. 6a-14a). The court also held that "to the same extent that § 1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction" (*id.* at 17a; footnote omitted) and that, so interpreted, Section 1391(e) is constitutional (*id.* at 18a-20a).

SUMMARY OF ARGUMENT

In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), this Court refused to read Section 1391(e) as broadly as its language would permit. The Court held it inapplicable to habeas corpus actions because they were not the type of "civil action" Congress had in mind when it enacted the statute.

[8] In reversing the district court's denial of the former employees' motion to dismiss, the court held that Section 1391(e) does not apply to defendants who, at the time the action is filed, "were not serving the government in the capacity in which they performed the acts on which their alleged liability is based" (Colby Pet. App. 6a; footnote omitted). This Court denied both respondents' petition for a writ of certiorari to review this ruling and the former employees' conditional cross-petition (Nos. 78-310 and 78-311, cert. denied, Jan. 16, 1979).

Congress likewise did not have damages actions against federal employees in mind when it enacted Section 1391(e). Federal officials generally were immune from liability for acts arising within the outer perimeter of their duties, and there was then no implied right of action for violations of the Constitution. Nearly every damages action against a federal employee was based on an alleged breach of common law duties, and there was no venue problem in such suits.

Section 1391(e) was drafted and passed against that background, as an adjunct to what is now 28 U.S.C. 1361, which gave district courts throughout the country jurisdiction to grant mandamus relief, a jurisdiction that previously had been limited to the district court for the District of Columbia. The hearings held on the predecessor of the bill that became Sections 1361 and 1391(e), and the three committee reports that discuss the purpose and scope of that bill, demonstrate that Section 1391(e) was intended to eliminate the problem that indispensable parties usually lived outside the plaintiff's district. The bill gave broader venue in actions for mandamus or similar judicial relief from administrative action, and thus permitted such suits nationwide even when policymaking officials could be found only in the District of Columbia. The language "under color of legal authority" was inserted in Section 1391(e) because such suits often named the official individually in order to circumvent the sovereign immunity defense, and Congress wanted to be sure that relief would not be denied because the plaintiff named the defendant

in his individual capacity. But Congress had no further purpose in enacting the statute, and during the hearings members of Congress repeatedly stated that the statute would not apply to damages actions. Such actions never had raised a venue problem comparable to the problem in mandamus suits, and thus there was no need for new or unusual venue rules.

Section 1391(e) certainly would be an unusual venue rule if applied to damages actions. The principal rules of venue in such actions have been geared to the convenience of the defendant and, in more recent years, to the place where the claim arose. Exceptions to this policy are few, and this Court has properly refused to recognize them where Congress has not clearly announced its intention to do so. It has not done so here.

ARGUMENT

SECTION 1391(e) DOES NOT APPLY TO ACTIONS SEEKING DAMAGES FROM FEDERAL EMPLOYEES

The basic rule of venue in federal suits seeking damages from individual persons for violations of federal laws is that "[the] action * * * may be brought only in the judicial district where all defendants reside, or in which the claim arose" (28 U.S.C. 1391(b)). The application of that rule to these cases would require a decision in favor of petitioners. Because in neither case do all of the defendants reside in the same district, both cases could have been brought only where "the claim arose." In *Stafford* the proper court would be the Northern District of Florida; in *Colby*

the proper court would be the Eastern District of New York (or, arguably, the Eastern District of Virginia, which contains the headquarters of the CIA).

The courts of appeals held, however, that 28 U.S.C. 1391(e) creates a different rule for federal employees. If the statute is read broadly there is no escaping that conclusion. Section 1391(e) creates a special venue rule for civil actions in which "a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority * * *." The parties agree that if Section 1391(e) applies to suits seeking damages from the pockets of federal employees, and if it is constitutional (see note 1, *supra*), then these cases properly could be brought in the District of Columbia and Rhode Island instead of Florida and New York.

We argue in the bulk of this brief that the legislative history of Section 1391(e) and practical considerations counsel against a broad reading of the statute. Indeed, both courts of appeals have declined to give the statute its broadest literal reading: both have exempted from suit under Section 1391(e) persons who had left the government or were serving in a different capacity by the time suit was filed. Colby Pet. App. 4a-6a, cert. denied on this issue, Nos. 78-310 and 78-311 (Jan. 16, 1979); *Lamont* v. *Haig*, No. 75-2006 (D.C. Cir. Oct. 16, 1978). This treatment of the statute cannot easily be justified by its language: former officials, no less than current officials, are officers or employees sued because of their

acts under color of law.[9] Both courts, however, came to this conclusion because of their interpretation of the legislative history (Colby Pet. App. 4a-5a; *Lamont*, *supra*, slip op. 11-14), which, both courts concluded, did not contain a sufficient indication of congressional intent to abrogate the limits of Section 1391(b) in damages actions simply because the defendant once had some connection to the federal government.

Legislative history and practical considerations, then, have played a role in the understanding of Section 1391(e) despite its apparent breadth.[10] In approaching Section 1391(e) in this fashion, the courts of appeals were following a path that was blazed by this Court, which already has held that Section 1391(e) should not be given a literal reading. *Schlanger*

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[9] Both courts relied in part on the statute's reference to a person who "is" a federal employee. This meant, they said, that the statute does not apply to a person who "was" a federal employee. This construction is unsatisfactory. The reliance on the present tense could not explain the holding that Section 1391(e) does not apply to a person who "is" a federal employee at the time suit is filed, but who is serving in a job other than the one he held at the time of the allegedly unlawful acts. And the courts did not discuss the possibility that the present tense applies only to the defendant's official capacity at the time of the acts complained of, rather than his capacity at the time suit was filed.

[10] See also *United States* v. *Culbert*, 435 U.S. 371, 374 n.4 (1978); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); and *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940), all concluding that the legislative history of a statute is pertinent no matter how plain the statute's words may appear to be.

v. *Seamans*, 401 U.S. 487 (1971). We turn to that case.

A. This Court Has Declined To Read Section 1391(e) As Broadly As Its Language Would Permit

In *Schlanger* a serviceman on detached duty to attend college in Arizona brought a habeas corpus action in Arizona against the Secretary of the Air Force and the plaintiff's commanding officer, who was in Georgia. The district court dismissed the petition for lack of jurisdiction because "neither the Secretary of the Air Force nor petitioner's commanding officer is within the territorial jurisdiction of this court or within reach of this Court's process." *Schlanger* v. *Seamans*, No. 69-381 Phx. (D. Ariz. Feb. 10, 1970). The court of appeals affirmed. *Schlanger* v. *Seamans*, No. 25,525 (9th Cir. May 20, 1970). The serviceman petitioned for a writ of certiorari, contending that under *Ahrens* v. *Clark*, 335 U.S. 188 (1948), he was "precluded from filing the action in any district *except* Arizona" and that the district court had personal jurisdiction over respondents because they "are amenable to process under 28 U.S.C. 1391(e)." *Schlanger* v. *Seamans*, No. 5481, October Term, 1970, Pet. 11. After the petition was granted, petitioner argued that the fact that his commanding officer and the Secretary were not in Arizona did not deprive the district court of jurisdiction over them in light of Section 1391(e). Br. 16-18. Petitioner argued that his Arizona suit against federal officials who resided in Georgia and the District of Columbia was "precisely the situation" that Section 1391(e) had been

meant to address (Br. at 18), and he urged that "[t]here are compelling reasons for this Court to apply the intentionally broad language of 28 U.S.C. § 1391(e) to actions such as the one at bar" (*id.* at 19). The federal respondents answered that "the well established principles of habeas corpus jurisdiction should [not] be abandoned wholesale, which would be the result of a blind application of the literal language of Section 1391(e)." Resp. Br. 34.

Squarely faced with the question whether Section 1391(e) applied, this Court concluded that "the absence of [petitioner's] custodian is fatal to the jurisdiction of the Arizona District Court." *Schlanger* v. *Seamans*, *supra*, 401 U.S. at 491. Section 1391(e), the Court held, did not require a different result. Without disputing the reach of the statute's language, the Court stated that "the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia. Though habeas corpus is technically 'civil,' it is not automatically subject to all the rules governing ordinary civil actions." 401 U.S. at 490 n.4 (citations omitted).[11] The Court thus declined

[11] Other cases also look behind the language of a venue statute to conclude that it should not be applied as broadly as its language would permit. In *In re Hohorst*, 150 U.S. 653, 661 (1893), the Court held that when Congress amended a statute providing venue in an action "against an inhabitant of the United States" by substituting the phrase "against any person," it did not intend to broaden the statute to include actions

to give Section 1391(e) a literal reading, because such a broad reading was neither required by the legislative history nor consistent with other sound considerations regarding appropriate venue. This approach to Section 1391(e) supports our position here.

B. The Legislative History Of Section 1391(e) Demonstrates That Congress Did Not Envision Its Application To Damages Suits

1. *Legal rules about damages actions when Section 1391(e) was being considered*

The legislative history of Section 1391(e) demonstrates that Congress never envisioned that it could be applied to damages actions against federal officers or employees.[12] A full understanding of that legislative history requires an appreciation of the state of the law when the bill containing Section 1391(e) was

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against aliens. The Court reaffirmed this reasoning in *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706 (1972), which held that, notwithstanding the provision of 28 U.S.C. 1400(b) that patent infringement suits could be brought only in the district where the defendant resides or where he has committed acts of infringement and maintains a regular place of business, a patent infringement suit against an alien could be brought in any district under 28 U.S.C. 1391(d) ("an alien may be sued in any district"). See also *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976) (national banks may be sued only where they are located, despite the nationwide venue provisions of the securities laws).

[12] As a general matter, federal venue questions turn on what "most nearly approximates the intent of Congress * * *." *Denver & R.G.W. R.R.* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556, 562 (1967). See also *Pure Oil Co.* v. *Suarez*, 384 U.S. 202, 207 (1966).

first introduced in 1960, debated, and finally enacted in 1962.

a. *Federal officers were immune from suits arising out of acts taken within the outer limits of their authority*

In 1896 this Court held that the Postmaster General was immune from suit for conduct "not unauthorized by law, nor beyond the scope of his official duties" even though the plaintiff alleged that the Postmaster General had acted maliciously. *Spalding* v. *Vilas*, 161 U.S. 483, 493 (1896). The Court relied on cases holding judges absolutely immune from suit for acts done in their official capacity and concluded that "the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law." *Id.* at 498. If the official's acts are not "manifestly or palpably beyond his authority," the Court stated (*ibid.*), "his conduct cannot be made the foundation of a suit against him for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects" the plaintiff. *Id.* at 499. If the "acts did not exceed his authority, nor pass the line of his duty * * * [t]he motive that impelled him to do that of which the plaintiff complains is * * * wholly immaterial." *Ibid.*

In 1926, in a case remarkably similar to *Stafford*, the Second Circuit held that a federal prosecutor could not be sued for malicious prosecution. The complaint in that case (*Yaselli* v. *Goff*, 12 F.2d 396) alleged that the prosecutor provided a grand jury with fictitious information, with the malicious intent to obtain an indictment and procure the arrest of the plaintiff (12 F.2d at 397). At the criminal trial, the court dismissed the case for want of evidence (*id.* at 398-399). The Second Circuit concluded that the complaint did not state a claim on which relief could be granted, because prosecutors enjoy the same immunity as judges (*id.* at 404-407). After receiving briefs and hearing oral arguments, this Court affirmed without opinion. 275 U.S. 503 (1927). Prosecutorial immunity is still in force. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 29-38.

In 1959 the Court was called on to decide whether the absolute immunity of *Spalding* extended to officers of less than Cabinet rank. In *Barr* v. *Matteo*, 360 U.S. 564 (1959),[13] the plaintiffs brought suit for libel under the laws of the District of Columbia, alleging that Barr, then acting director of an administrative agency, had libelled them, and maliciously so, in a press release he issued in response to congressional criticism of the agency's actions. Barr claimed an

[13] There was no opinion for the Court in *Barr*. Four Justices joined a plurality opinion, and Mr. Justice Black filed a concurring opinion. The plurality opinion stated the governing rule, however. See *Howard* v. *Lyons*, 360 U.S. 593 (1959).

absolute immunity from suit, and this Court held that it is "in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation * * *" (*id.* at 572, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d. Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The critical question was not whether Barr was required to issue the press release, but simply whether he had done so "in the line of duty * * * for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." *Barr* v. *Mateo*, *supra*, 360 U.S. at 575. The Court concluded that the fact that Barr's press release "was within the outer perimeter of [his] line of duty is enough to render the privilege [of absolute immunity from suit] applicable, despite the allegations of malice in the complaint * * *" (*ibid.*).

b. *In most cases there was no right of action in federal court*

Barr did not deal with the question of privilege that "would have been presented had the officer ignored an express statutory or constitutional limitation on his authority" and thus it did not "purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz* v. *Economou*, *supra*, slip op. 10. *Barr*, *Yaselli* and *Spalding* dealt only with

immunities, which did not cover every possible wrong. But the law of immunities was only half the story: immunities are irrelevant unless the plaintiff has a right of action to begin with. Rights of action against federal officers have been rare. No federal statute authorizes suit in federal court to collect damages from federal officers who violate the Constitution or federal law. In 1960 to 1962, then, suits for damages against federal officials would have been all but impossible, not simply because of immunities but because there was no implied federal right of action for violations of constitutional rights. Moreover, the view prevailing at that time was that a federal right of action even for a statutory violation was entirely within the control of Congress.

In *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), this Court, in rejecting the contention that a person served with a subpoena that allegedly had been issued in violation of a federal statute had a right of action for damages, summarized the problems facing prospective plaintiffs in damages actions. "Congress has not created a cause of action for abuse of the subpoena power by a federal officer," said the Court (*id.* at 651), and "it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The instances where we have created federal common law are few and restricted." And, continued the Court, "it is difficult for us to see how the present statute, which only grants power to issue subpoenas, implies a cause of action for abuse of that power. Congress has not

* * * left to federal courts the creation of a federal common law for abuse of process." 373 U.S. at 651-652. "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. * * * Congress could, of course, provide otherwise, but it has not done so. * * * We conclude, therefore, that it is not for us to fill any *hiatus* Congress has left in this area." *Id.* at 652.

Not until 1971, nearly a decade after Section 1391 (e) was enacted, did this Court hold that a person whose constitutional rights had been violated might have a right of action in federal court for damages against the offending officials. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The question had been reserved in *Bell* v. *Hood*, 327 U.S. 678 (1946), and, as this Court stated last Term, "*Bivens* established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts * * *." *Butz* v. *Economou*, *supra*, slip op. 7 (footnote omitted).

Although in 1960 a person had no federal right of action for damages against federal officials for violations of federal statutes or the Constitution, damages suits against federal officers or employees for alleged violations of state common law duties were fairly common, as *Wheeldin* v. *Wheeler*, *supra*, had recognized. These actions, based on state tort law, could be brought in federal courts if the parties were

of diverse citizenship,[14] or could be removed to federal court from a state court.[15] Federal courts entertained actions for damages in a variety of contexts, including claims that defendant federal officials had slandered the plaintiff, falsely imprisoned him, conspired against him or damaged his business relationships.[16]

2. *Section 1391(e) was designed to provide venue in suits seeking to compel an officer or employee to perform a duty*

The law prevailing in the early 1960s, which we have summarized above, meant that few persons had

[14] See 28 U.S.C. 1332(a). Venue in diversity actions is governed by 28 U.S.C. 1391(a), which provides that such cases may be brought "only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." The ability of plaintiffs to bring suit where the plaintiffs reside is restricted by Fed. R. Civ. P. 4(f), setting territorial limits on service of process.

[15] See 28 U.S.C. 1442.

[16] See, *e.g.*, *Sauber* v. *Gliedman*, 283 F.2d 941 (7th Cir. 1960), cert. denied, 366 U.S. 906 (1961) (damages action brought by indicted IRS official against special assistant to the Attorney General for making allegedly defamatory statements to the press); *O'Campo* v. *Hardisty*, 262 F.2d 621 (9th Cir. 1958) (damages action against IRS officials for alleged conspiracy to destroy plaintiff's business); *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) (damages action against Department of Justice officials in New York for alleged false imprisonment at Ellis Island); *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965) (action against federal marshals for assault and battery and conspiracy); *DeBusk* v. *Harvin*, 212 F.2d 143, 147 (5th Cir. 1954) (damages suit by former government employee against supervisors, alleging conspiracy).

federal rights of action for violations of constitutional or statutory rules.[17] Even when there was a right of action created by state law (in which case there might be diversity or removal jurisdiction) or implied by a federal court (in which case there would be jurisdiction under 28 U.S.C. 1331), the federal employee usually could abort the suit at the outset by relying on official immunity.[18] Whether the suit was brought under diversity or under federal question jurisdiction, venue was proper where the defendants could be found; in diversity cases venue also was proper

[17] The scope of federal rights of action still is unclear. We have argued (*Carlson* v. *Green*, petition for cert. pending, No. 78-1261) that there is no implied right of action against federal officials when recovery could be sought from the United States under the Federal Tort Claims Act. If the Court agrees with this analysis, then the *Colby* suit cannot be maintained, for recovery can be had under the Tort Claims Act (see *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978). Analysis of *Stafford* is more difficult, because Goodwin's alleged perjury may be a form of "deceit" that is outside the scope of the FTCA (28 U.S.C. 2680(h)), and the activities of Stafford, Carrouth and Meadow, if actionable at all, would be a form of "malicious prosecution" that was outside the scope of the FTCA until 1974 (Pub. L. No. 93-253, 88 Stat. 50). We need not pursue the matter, however; it is enough to note that damages actions of the sort at issue here are problematic even today, and they would not have been within the contemplation of Congress in 1960 and 1962.

[18] Damages actions were sufficiently rare that this case is controlled by the principle that venue statutes should not be "inflexibl[y]" applied in a way that dictates "the choice of an inconvenient forum * * * in a class of cases which could not have been foreseen at the time" the statute was enacted. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 500 (1973).

where all plaintiffs resided. 28 U.S.C. (1958 ed.) 1391(a) and (b).[19] And although sometimes that forum was inconvenient to one party or another, cases could be transferred under 28 U.S.C. 1404(a). Venue simply was not a problem in such cases, or at least no one complained about it. People did, however, complain about venue in cases to compel federal officers to carry out duties imposed on them by law, and these complaints led to the enactment of Section 1391(e).

a. *The 1960 bills in the House*

i. The anomalous scope of mandamus jurisdiction in 1960

At common law, a court could issue a writ of mandamus to compel a government official to perform his duty. See, *e.g.*, *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177-178 (1925).[20] In *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 503 (1813), and *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 617-621 (1838), this Court held that Congress had

[19] The statute was amended in 1966 to permit both diversity and federal question cases to be brought in the district in which the claim arose. Pub. L. No. 89-714, Section 1, 80 Stat. 1111.

[20] Fed. R. Civ. P. 81(b) abolished the writ of mandamus but provided that "[r]elief heretofore available by mandamus * * * may be obtained by appropriate action or by appropriate motion under the practice prescribed in these Rules." For convenience, we will refer to a post-Rules "action in the nature of mandamus" or "relief in the nature of mandamus" as simply an action for mandamus, or mandamus relief.

not granted the federal courts jurisdiction to issue writs of mandamus, and that the only court that had such jurisdiction was what is now the United States District Court for the District of Columbia, which obtained jurisdiction from the law of Maryland on cession in 1801.[21]

For more than 150 years after *Kendall*, Congress did nothing to provide mandamus jurisdiction to courts outside the District of Columbia, and thus litigants who sought mandamus were required to press their cause in that court or none at all. Litigants often sought to avoid this obstacle by bringing suit nearer to home for conventional injunctive or declaratory relief. But there they foundered on another barrier: such actions, though ostensibly against a subordinate federal official who could be found locally, frequently were dismissed because the defendant's superior officer (usually a Cabinet officer or agency head, and usually stationed in the District of Columbia) was an indispensable party, and a local federal court had no means of obtaining jurisdiction over him. See *Williams* v. *Fanning*, 332 U.S. 490 (1947) (discussing cases); *Stroud* v. *Benson*, 254 F.2d 448 (4th Cir. 1958); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review*, 75 Harv.

[21] Federal courts did have authority under the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 82 to issue any writ, including mandamus, "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." See *McIntire* v. *Wood*, *supra*, 11 U.S. (7 Cranch) at 504; 28 U.S.C. 1651. Authority under this statute, however, pertained primarily to appellate control of lower courts' proceedings.

L. Rev. 1479, 1493-1499 (1962). As one advocate of reform concluded: "In these categories of cases petitioner's suit often is dismissed not because of a reasoned legislative or judicial determination that judicial review is inappropriate in the circumstances but for reasons that have nothing to do with the propriety or lack thereof of judicial review of the administrative action in question." *Id.* at 1483.

In 1960 Congress moved to correct the "historic accident" that had limited judicial review of many official actions to the District of Columbia. H.R. Rep. No. 1936, 86th Cong., 2d Sess. 2 (1960). The House Judiciary Committee considered a bill—H.R. 10089, 86th Cong., 2d Sess. (1960)—that would have permitted a person to bring a "civil action * * * against an officer of the United States in his official capacity * * * in any judicial district * * * where a plaintiff in the action resides." [22]

The Department of Justice, commenting on the bill, pointed out an omission that rendered the bill useless. Although the bill permitted a plaintiff to bring suit against an officer in his official capacity in the district where the plaintiff resided, it neglected to give the district courts jurisdiction to hear such suits. "H.R. 10089 relates only to venue," said the Department of Justice, "and this bill would not confer mandamus jurisdiction on courts other than the district court for the District of Columbia." H.R. Rep. No.

[22] An identical bill had been introduced in 1958, but no action was taken on it. H.R. 10892, 85th Cong., 2d Sess. (1958).

1936, *supra*, at 6. The Department of Justice also pointed out that "[m]ost actions * * * brought against a public official" sought either to enjoin him from taking action that the plaintiff claimed was illegal or "(2) to seek damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority." But both types of suits "are against the official in his individual capacity" and thus beyond the scope of the Committee's concern (*ibid.*).

ii. The hearings on the bill

After receiving these comments a subcommittee held hearings on the bill. These hearings demonstrate that the bill was intended to apply only to judicial review of administrative action, and not to provide venue in damages actions against government officials. *Hearings on H.R. 10089 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., (May 26 and June 2, 1960).[23]

Representative Budge of Idaho, the author of H.R. 10089, testified that the "problem" that the bill was designed to cure occurred when "a dispute arises between a citizen of my State and an agency of the United States Government" and the district judge in Idaho "concludes that he is without jurisdiction in the case and that he must dismiss the suit, and the case then has to be filed in the District of Columbia." *Hearings, supra*, at 2-3. Murray Drabkin, the

[23] The transcripts of these hearings are unpublished. We are lodging a certified copy with the Clerk of this Court.

committee's counsel, asked Representative Budge: "In particular, what kinds of actions or what kinds of problems have arisen in Idaho to precipitate this kind of solution?" Representative Budge replied: "As it is now, there is no opportunity for a judicial review of the action of any decision that is made by a Federal officer in charge out there, no matter how arbitrary or capricious, because it is too expensive to come back here to litigate it." *Hearings, supra*, at 19-20.

Donald MacGuineas, testifying on behalf of the Department of Justice, reiterated the Department's view that the bill neglected to provide jurisdiction to the district courts. He said: "I think the Committee ought to bear in mind, it apparently assumed that this bill was intended to cover only a mandamus action." *Id.* at 31-32. Drabkin corrected him: "I think what this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." *Id.* at 32.[24]

[24] Representative Dowdy stated at this point: "I asked to be sure it was not limited to that." *Ibid.* The court of appeals in *Colby* assumed that Rep. Dowdy was replying to Mr. Drabkin and inferred that Rep. Dowdy's statement that the bill was not to be limited to "that" referred to "mandamus and also * * * petitions for review." The court concluded that Rep. Dowdy believed that the bill covered damages actions. See Colby Pet. App. 9a-10a. This is a misreading of Rep. Dowdy's position. As he later stated: "I don't understand that we have in consideration suits for money damages. That would be maybe where a person is being sued as an individual. * * * They would not be covered by this." *Hearings, supra*, at 87.

Thus, when Rep. Dowdy stated: "I asked to be sure it was not limited to that," he was apparently answering Mr. MacGuineas's statement of the bill's scope, not Mr. Drabkin's.

But if the bill was intended to cover administrative review, not just mandamus, it was too narrowly worded, as MacGuineas explained: "You may get into a very expanded and complicated area of law if this bill is intended not to be limited to mandamus but to [include] injunction actions. For instance, where the citizen seeks to enjoin the Government official from taking certain actions * * * that is not a suit against the official in his official capacity. It is then a suit against him in his individual capacity." *Hearings, supra*, at 32; see also *id.* at 33-34.[25]

In response to this problem the bill was amended to add the words "under color of legal authority." The amendment was suggested when the subcommittee reconvened the following week. Representative Poff asked Mr. MacGuineas (*id.* at 54):

> Mr. Poff. Wouldn't you say the author's objective is to give a citizen who has a legitimate complaint against his Government the right to sue his Government at the place where the wrong was committed?
>
> Mr. MacGuineas. The difficulty, if I may say so, Congressman, with your statement, is you speak of the right to sue his Government. Now that proposition in itself raises very difficult and complicated legal questions which I touched upon at my appearance last week.
>
> You must first decide whether a particular suit is actually a suit against the man in his official capacity or whether it i[s] a suit against

[25] See also pages 38-41, *infra*.

> the Government officer in his individual capacity. If it is the latter, it is not in any sense a suit against the Government.
>
> Mr. Poff. We are talking about technicalities * * *.

Mr. Drabkin, the committee's counsel, asked: "Mr. MacGuineas, isn't really the important question in the kind of case you raised whether or not it is in the performance of the official's duty? * * * [I]t is the intention of the author that the Government no longer should be able to retreat behind this artificial concept of individual action which has grown up to evade the sovereign immunity doctrine." *Hearings, supra*, at 57. Mr. Drabkin continued, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official capacity or under color of legal authority'." *Id.* at 61.

MacGuineas responded, with what must now be recognized as a good deal of prescience, that such language might later be interpreted to cover a damages action against a government official—slander, for example—and thus would raise "serious policy questions" by allowing a government official to be sued in the plaintiff's home district while a private defendant in an analogous action could be sued only in the district of his residence. *Id.* at 62-63. The chairman and the senior member of the subcommittee—two of the four members present—agreed (*id.* at 63):

> Mr. Forrester. I am inclined to think there is something to that.
>
> Mr. Poff. There is.

When Judge Maris, representing the Judicial Conference of the United States, testified, he and Representative Poff agreed that the situation to which MacGuineas had referred was a "legitimate problem" (*Hearings, supra*, at 85), and that "injustice" could be avoided only if such suits were limited to the district where the right of action arose. As Judge Maris concluded: "That is the normal procedure in the law. That is what ordinarily happens in the ordinary law suit." *Id.* at 86.

To eliminate the phrase "under color of authority," however, would have revived the problem that that phrase was intended to solve; the bill would not have reached suits for injunctive relief against a government official, because such suits were brought against him in his individual capacity to avoid the defense of sovereign immunity. See pages 38-41, *infra*. Representative Poff therefore stated that the "under color" phrase should be kept, but on the understanding that the statute would not apply to individual actions against government officials:

> Mr. Poff. If we agree that no serious injustice would be worked upon the defendant who was ultimately found to have been acting outside the scope of his employment, if we confined the venue to the place where the cause of action arose or where the property was situated, then don't you think it would be advisable to add after the word "capacity" in the revised draft, the words "or under color of legal authority?"

Hearings, supra, at 91-92. Judge Maris replied:

> I would be very happy to see that. I think that would tend to put at rest this fictional doctrine, which would be a good thing to bury that very deep underground if we could and get right down to what is really the fact—reviewing official action. That is what we are doing. We just have our tongues in our cheeks because of this ancient doctrine of sovereign immunity * * *.
>
> * * * * *
>
> That is what it all amounts to, but I think you have come around to face it squarely now and say you shall have that right directly and not talk about a fiction or subterfuge.

Judge Maris later agreed with Representative Whitener that " 'color of authority' would [not] in any way broaden the area of the law suit." *Id.* at 96.

Representative Dowdy—the fourth member—also concluded that the statute would not apply to damages actions (*id.* at 87):

> Mr. Dowdy. Speaking to the point you were talking about, I don't understand that we have in consideration suits for money damages. That would be maybe where a person is being sued as an individual.
>
> Judge Maris. * * * [O]rdinarily I do not think suits for money damages would be involved.
>
> Mr. Dowdy. They would not be covered by this.

Representative Budge, the author of the bill, closed the hearings by testifying: "We always get off into these slander type actions which is not what I am seeking at all. * * * All I am seeking to do is to have the review of their official actions take place in the United States District Court where the determination was made." *Hearings, supra*, at 102. No member of the subcommittee took issue with that statement of the scope of the bill, nor did any member of Congress do so afterwards.

iii. The redrafted bill and the committee report

Following these hearings, the House Subcommittee redrafted H.R. 10089. The new bill—H.R. 12622, 86th Cong., 2d Sess. (1960)—contained two sections. Section 1 supplied the jurisdictional grant that was missing from H.R. 10089. This section provided: "The district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform his duty." H.R. Rep. No. 1936, *supra*, at 9. Section 2—which as later amended became 28 U.S.C. 1391(e)—provided venue, stating in pertinent part: "A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated." Section 2 also provided for service of process by registered mail on extraterritorial defendants.

The revised language of H.R. 12622, whatever its ambiguities, is consistent with the expressed intent of all four members of the subcommittee that the bill was not to be read as applying to actions against federal officials in their truly individual capacities, that is, actions for damages. The Committee knew from the Department of Justice's letter, and from the discussion at the hearings, that both suits against an official for damages and suits for injunctive relief were considered to be suits against the official in his "individual capacity," although for different reasons. In the former case, the officer was sued individually because he would be liable personally. In the latter case, he was sued individually because a suit against the government would be barred by sovereign immunity. Therefore, the revised bill did not provide venue for suits against an official "in his individual capacity." The Committee retained the "under color of authority" terminology, so that one kind of "individual capacity" suit—the kind used to avoid sovereign immunity in some actions—would be covered. This made it clear that "[t]he purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district court outside of the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." H.R. Rep. No. 1936, *supra*, at 1.

"This bill," the Committee continued, "is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal

official in the U.S. District Court for the District of Columbia." *Id.* at 2; see *Schlanger* v. *Seamans*, *supra*, 401 U.S. at 490 n.4. This language also demonstrates that suits for damages against federal officials are not covered by the bill; as we have shown (pages 21-24, *supra*), such suits were brought outside the District of Columbia when they could be brought at all. As two distinguished commentators summarized the situation, Section 1391(e) "disposed of the indispensable superior problem, not by making the superior dispensable, but by liberalizing venue and service-of-process requirements to permit the plaintiff to join the superior in the action in the field against the subordinate." Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 310 (1967). It did that, and no more.

The House Judiciary Committee's discussion of Section 2 also supports the construction of the bill that we urge here. The Committee pointed out the "historic accident" that had limited mandamus jurisdiction to the District of Columbia. H.R. Rep. No. 1936, *supra*, at 2. Requiring a person to travel to that court for mandamus relief was, in the Committee's view, "an unfair imposition upon citizens who seek no more than lawful treatment from their Government." *Ibid.* Thus, Section 1 allowed every district court to exercise mandamus jurisdiction, and "Section 2," the Committee stated, "is the venue section of the bill. Its purpose is similar to that of Section 1. It is designed to permit an action which is

essentially against the United States [26] to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." H.R. Rep. No. 1936, *supra*, at 2.

The Committee's report went on to conclude that "the current state of the law * * * is contrary to the sound and equitable administration of justice." *Id.* at 3. Because the actions covered by the bill "are in essence against the United States," the United States Attorney in the local district could defend them at no inconvenience to the government. On the other hand, the citizen "aggrieved by the workings of Government" who lives thousands of miles from Washington would be severely inconvenienced by the requirement that he bring suit there. *Ibid.*

Even beyond considerations of convenience, the Committee went on, broadening venue would serve the ends of "efficient judicial administration" because "these proceedings involve problems which are recurrent but peculiar to certain areas such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently." *Ibid.* Furthermore, the broadened venue provisions of the bill would alleviate

[26] The Committee apparently chose the words "an action which is essentially against the United States" rather than simply a "mandamus action" because the Department of Justice had advised the Committee that actions essentially against the United States included those for a mandatory injunction as well as for mandamus (page 27, *supra*).

court congestion in the District Court for the District of Columbia and thus allow the prompt dispensation of justice by courts with less crowded dockets. H.R. Rep. No. 1936, *supra*, at 3.

The Committee stated that Section 2 of the bill was designed "[t]o achieve these results." *Ibid.* "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391 (e) applicable" to two types of cases. *Id.* at 3-4. First, said the Committee, are "those cases where an action may be brought against an officer or employee in his official capacity." *Id.* at 4. Second,

> those cases where the action is *nominally* brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. *Such actions are also in essence against the United States* but are brought against the officer or employee as [an] individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official be brought locally rather than in the District of Columbia require similar venue provisions where *the action is based upon the fiction that the officer is acting as an individual.* There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.

Id. at 3-4 (emphasis added).

iv. The distinction between suits against defendants in an individual capacity and those in an official capacity

Damages actions do not fall within either category discussed by the report. They seek money from the pockets of the defendants, not from the Treasury; they seek relief from persons as individuals, not as officials. They are not "in essence against the United States" because the United States does not pay the judgments. They are not based on a "fiction" of any sort.

Because the Committee drew a distinction between suits against an individual and those "in essence against the United States," it is important to understand that distinction in the way the Committee must have understood it. We have discussed at pages 28-33, *supra*, the understanding of the subcommittee members. The principal case articulating the distinction—*Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)—also sheds light on what Congress understood. A private corporation sued the Administrator of the War Assets Administration, alleging that the Administrator had breached a contract to sell coal to the corporation and seeking both an injunction to prohibit him from delivering the coal to anyone else and a declaration that the sale to the plaintiff was valid. The district court dismissed the complaint because the suit was in essence against the United States and

thus barred by sovereign immunity.[27] The court of appeals reversed, but this Court upheld the district court.

The Court noted at the outset that:

> It was not alleged that the contract for the sale of coal was a contract with the officer personally. The basis of the action, on the contrary, was that a contract had been entered into with the United States. Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action. The complaint was directed against him because of his official function as chief of the War Assets Administration * * * [T]he existence of a right to sue the officer is not the issue in this case. The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable.

337 U.S. at 686-687 (footnotes omitted). The Court held that, in deciding whether a suit nominally against the officer is in reality a suit against the sovereign, the "crucial question" is not who is named as defendant but "whether the relief sought * * * is relief against the soverign." *Id.* at 687. There is "no jurisdictional difficulty" presented by the sovereign's immunity when the suit seeks personal damages from the officer, for "[t]he judgment sought will not re-

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[27] In 1976 Congress abolished the defense of sovereign immunity in injunctive actions but retained the defense in actions for damages. See 5 U.S.C. 702; *Jaffee* v. *United States*, No. 78-2041 (3d Cir. Feb. 9, 1979), slip op. 10-14.

quire action by the sovereign or disturb the sovereign's property." *Ibid.* The difficulty arises when the suit seeks equitable relief, such as an injunction or specific performance, for "[i]n each such case the compulsion * * * may be compulsion against the sovereign, although nominally directed against the individual officer." 337 U.S. at 688.

Turning to the nature of the requested relief, the Court stated: "The relief sought in this case was not the payment of damages by the individual defendant. To the contrary, it was asked that the Court order the War Assets Administrator, his agents, assistants, deputies and employees and all persons acting under their direction, not to sell the coal involved and not to deliver it to anyone other than the [plaintiff]. * * * [T]his was relief against the sovereign * * *." *Id.* at 688-689. The Court recognized, however, that equitable relief sought against an officer would be available in two kinds of case—first, where the officer was alleged to be acting beyond statutory limitations on his powers, and, second, where the officer was acting within his powers but the statute conferring the powers was alleged to be unconstitutional. *Id.* at 689-690.

Measured by *Larson*'s guidelines, it is clear that suits for damages such as those at issue here do not fit within the types of actions contemplated by the Committee. The Committee must have intended in providing venue for actions "nominally" against the officer and "in essence against the United States * * * to circumvent what remains of the doctrine

of sovereign immunity" those actions maintainable under *Larson*—actions for injunctive relief from conduct alleged to be either *ultra vires* or authorized by an unconstitutional statute. In such cases, and no others, would a plaintiff be able under *Larson* to "circumvent * * * sovereign immunity." H.R. Rep. No. 1936, *supra*, at 4. See *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962).

Damages suits never have depended on fictions or evasions of sovereign immunity. Because the official is personally liable, sovereign immunity is irrelevant. Far from depending on the "fiction" that the officer is acting as an individual, such damages suits put the question of his status in issue and require proof that he was actually acting as an individual—*i.e.*, beyond the outer limits of his constitutional or statutory authority.

In short, then, the Committee's statement of the purposes of the bill (to enable actions previously limited to the District of Columbia to be brought elsewhere) and its detailed statement of the purposes of Section 2 (to provide venue for suits that are either against an officer in his official capacity or in essence against the United States) demonstrate that actions against officers individually for damages were not under consideration.[28]

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[28] Professor Byse's contemporary analysis of the bill contained no hint that Section 1391(e) would do anything other than provide venue for "a nonstatutory review action against the subordinate or superior official * * *." Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review*, 75 Harv. L. Rev. 1479, 1513, 1520-1522 (1962).

v. The reference in the committee report to damages actions

Against this evidence that Section 1391(e) was not intended to apply to damages suits such as the present ones, the courts of appeals relied heavily on one sentence in the Committee's report. After discussing the inequity of limiting mandamus jurisdiction to the District of Columbia, and focussing on "[t]he problem of venue [that exists] in actions against Government officials for judicial review of official action" (H.R. Rep. No. 1936, *supra*, at 2), the Committee stated: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." *Id.* at 3. This reference is odd because, as we have shown, there was no "venue problem" in damages actions against government officials. See pages 11-12, 21-24, *supra*. Such suits were brought throughout the country, and the plaintiffs had only to satisfy conventional rules of jurisdiction and venue. The Committee's statement—otherwise wholly unexplained—is enigmatic; it is too fragile a basis, we submit, for a holding that the Committee intended to override the usual venue rules and provide nationwide venue for actions such as these.

b. *Enactment of the statute in 1962*

H.R. 12622 passed the House in 1960, but the Senate adjourned without acting on it. The same bill was reintroduced in the 87th Congress as H.R.

1960. The House Judiciary Committee republished its earlier report on H.R. 12622 as H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961). The Committee's statement in the latter report is identical to its earlier one.

The bill was referred to the Senate, and the Senate Judiciary Committee solicited comments on it. Deputy Attorney General White responded on behalf of the Department of Justice. S. Rep. No. 1992, 87th Cong., 2d Sess. 5-7 (1962). The courts of appeals relied substantially on those comments as demonstrating that the statute applies to damages actions (Stafford Pet. App. 8a-9a; Colby Pet. App. 11a-12a & nn. 19-21). Placed in context, however, Deputy Attorney General White's comments for the Department of Justice support the opposite result.

The Department's comments stated: "The purpose of [Section 2] of the bill is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District. In effect, then, this venue provision would do away with the defense that a superior officer is an indispensable party because, with a grant of venue, a superior officer can be made a party." S. Rep. No. 1992, *supra*, at 6. As the prior committee reports demonstrate, this is an accurate statement of Section 2's purposes, and there is no indication that the Senate committee or any member of Congress took issue with it. The letter went on to state: "We believe that less confusion will result by tying in this simple venue grant directly to the Administrative

Procedure Act. This unquestionably eliminates suits for money judgments against officers * * *. It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation." *Ibid.*[29]

The courts of appeals assumed that the Department was proposing a substantive change to the bill (*i.e.*, elimination of venue for damages suits), and they inferred from the fact that the bill was enacted without change that Congress intended the bill to apply to damages actions. This is fallacious reasoning. If the Department of Justice had believed that Section 2 of the bill provided venue in "suits for money judgments against officers," it is inconceivable that the Department would have proposed a change disguised in the name of minimizing "confusion" and "achiev[ing] * * * the purpose of the sponsors." The Department instead would have stated its objections to the substance of the provision. And had the Committee believed that the Department of Justice was trying to bring about substantive changes, one would assume that it would have explicitly addressed such an approach. Yet the Committee's report is devoid of any such discussion on the matter, despite the fact that it devoted a lengthy

[29] The Department's letter also noted that Section 2 covers a subject "entirely different" from Section 1. S. Rep. No. 1992, *supra*, at 6. The *Colby* court apparently found this language significant (Colby Pet. 11a), but it is no more than a recognition that "venue is entirely different from jurisdiction * * *." *Johnson* v. *General Motors Corp.*, 242 F. Supp. 778, 780 (E.D. Va. 1965).

paragraph to discussing the Department's recommendations.

Deputy Attorney General White's letter should be read for what it purported to be—a suggestion for clarification to avoid the possibility that the bill would be construed to mean something (new venue rules for damages actions) Congress did not intend. That the bill was not clarified is regrettable; clarification would have avoided the litigation now before the Court. But Congress' neglect in this respect does not change the substantive scope of the statute. Giving a substantive meaning to legislative inaction is hazardous business at best; here that would be quite unwarranted.

The Senate Judiciary Committee amended the House version of the bill in two respects that are not germane to the present controversy.[30] It reported

[30] Section 1 of the House version gave the district courts jurisdiction to compel an officer, employee or agency to perform "his duty." The Senate changed this language to read "a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion." S. Rep. No. 1992, *supra*, at 8. The Committee's purpose was to make it clear that the bill was not providing jurisdiction "to direct or influence the exercise of discretion of the officer or agency in the making of the decision." *Id.* at 2.

The second change was in Section 2. The House version provided venue "in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated." H. R. Rep. No. 536, *supra*, at 6. The Senate changed this to its present version, to permit suit where the defendant could be found (as existing statutes allowed) and to require that, if real property were involved in the action, venue could not be based on the plaintiff's residence. S. Rep. No. 1992, *supra*, at 1-2.

on the bill favorably, and its report essentially reiterates the House report. Compare S. Rep. No. 1992, *supra*, at 2-4 with H.R. Rep. No. 536, *supra*, at 1-4. As the House Committee had done, the Senate Committee stated that the purpose of the bill was "to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." S. Rep. No. 1992, *supra*, at 2.[31]

[31] The House Reports had stated: "This bill is directed primarily at facilitating review by the Federal courts of administrative actions." H.R. Rep. No. 1936, *supra*, at 1; H.R. Rep. No. 536, *supra*, at 1. The court of appeals in *Colby* concluded: "Even if we were to acknowledge that the primary purpose of § 1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well." Colby Pet. App. 13a. This reasoning overlooks the language in the Senate report, which states: "The bill, as amended, is *intended* to facilitate review by the Federal courts of administrative actions." S. Rep. No. 1992, *supra*, at 2 (emphasis added). The Senate Committee's choice of language refutes the court's inference that the bill had a secondary purpose of providing venue in damages actions against government officers personally.

The Senate report, although repeating *verbatim* the House reports' description of the inequities of mandamus jurisdiction, did not repeat the House reports' lengthy statement of the purpose of Section 2, which we discuss at pages 34-37, *supra*. There is no indication from any source that the Senate Committee disagreed with that discussion, however, and nothing in the Senate report is inconsistent with that discussion.

The Senate report repeated the House reports' statement of the "venue problem" in damages actions (compare S. Rep. No. 1992, *supra*, at 3, with H.R. Rep. No. 536, *supra*, at 3) but shed no more light than the House Committee had on what that language meant.

Because both the House and Senate versions of the bill defined the jurisdictional portion (Section 1) in somewhat imprecise terms,[32] Deputy Attorney General Katzenbach wrote to floor managers in both chambers expressing fear that the bill might be subject to "varying interpretations" unless it were amended to refer specifically to actions "in the nature of mandamus." He proposed such a change "to remove all doubt that the legislative intent of the bill is to do nothing more than extend to all U.S. district courts jurisdiction in mandamus actions against Federal officials and employees." 108 Cong. Rec. 20079 (1962). Senator Carroll, the floor manager in the Senate, stated on the floor: "[A]fter consultation with the Department [of Justice] and with the interested parties in the other body, it was agreed that the suggested language would accomplish the legislative purpose we were seeking." *Ibid.* The Senate and the House accordingly amended the bill to limit it to an "action in the nature of mandamus" and passed it that day without opposition.[33] 108 Cong. Rec. 20079 (1962); 108 Cong. Rec. 20093 (1962); see

[32] See note 30, *supra*.

[33] Recent legislation demonstrates a continued understanding by Congress that Section 1391(e) deals only with suits in the nature of mandamus. The original statute dealt only with cases in which "each" defendant was a federal employee,

generally Byse and Fiocca, *supra*, 81 Harv. L. Rev. at 315-318.

When the bill was sent to the President for signature, Deputy Attorney General Katzenbach wrote to the Director of the Bureau of the Budget explaining that, because the bill had been amended to refer specifically to actions "in the nature of mandamus," the Department recommended approval. The Deputy Attorney General noted, however:

> While we believe that this bill should not be read as doing more than giving effect to the Congressional purpose to extend the mandamus jurisdiction of the District Court for the District of Columbia to other district courts throughout the country, there are portions of the legislative history which could suggest a broader grant of power. Accordingly we suggest that the President may wish to issue an announcement at the time he signs the bill making it clear that he considers the limited purpose controlling.

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and disputes arose about whether the inclusion of a non-federal defendant made Section 1391(e) inapplicable. Congress amended the statute in 1976 to change "each defendant" to "a defendant;" Congress also added a provision that the non-federal defendants are subject to conventional rules of venue. Pub. L. No. 94-574, Section 3, 90 Stat. 2721-2722. In recommending this amendment, the committee stated that the statute applies "in actions against the United States, is agencies, or officers or employees in their official capacities * * *." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 1 (1976). Neither the committee nor anyone else said in 1976 that Section 1391(e) applies to damages actions against officers or employees as individuals.

App., *infra*. The President followed the Deputy Attorney General's suggestion and issued a statement that the bill "will extend to all district courts the same jurisdiction heretofore enjoyed solely by the District Court for the District of Columbia to hear actions in the nature of mandamus against Government officials." 1962 Pub. Papers of the President 738.[34]

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[34] On January 18, 1963, some three months after the President signed the Act into law, a memorandum (a copy of which we are lodging with the Clerk of this Court) was sent over Deputy Attorney General Katzenbach's signature to all United States Attorneys providing tactical advice and case citations to be used in defending suits brought under the new Act. One paragraph of that memorandum (which the United States discovered after this litigation had begun and which we brought to the attention of the parties and the courts below) contained the following statements (page 7):

> The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority" the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity. * * * As an example, suits for damages for alleged libel or slander by Government officials * * * fall within the venue provision of this statute. * * *

It is impossible to reconcile this statement with the unequivocal statements of Deputy Attorney General Katzenbach to the Congress and to the President that the Act was intended to apply only to mandamus actions. The best explanation of these statements in the memorandum is that they are wrong.

C. Section 1391(e) Should Be Read To Make It Harmonious With The Venue Provisions For Other Damages Actions

Section 1391(e) creates a venue rule quite unlike the venue rules for diversity and federal question cases (Section 1391(a) and (b)), and the legislative history of Section 1391(e) indicates that Congress was concerned with the historical anomaly that had confined mandamus actions to the District of Columbia, rather than with problems of venue in damages suits. Many courts, including this Court in *Schlanger* v. *Seamans*, *supra*, therefore have declined to give the statute its broadest possible reading. It is not appropriate to approach Section 1391(e) "simply as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." *Natural Resources Defense Council, Inc.* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972).[35]

[35] In that case the court of appeals held that Section 1391(e) did not authorize an environmental group to sue the TVA in New York in order to litigate the TVA's decision to buy surface-mined coal. Because TVA always had headquarters outside the District of Columbia, it had not been subject to the indispensable defendant problem. The court of appeals held that "essentially local" federal agencies must be sued where they are located (459 F.2d at 259). In an earlier case the Second Circuit held that Section 1391(e) does not apply to suits against Senators or employees of Congress, reasoning that the statute was designed only to permit convenient review of administrative action. *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1383-1384 (1970).

Many other cases hold that Section 1391(e) does not apply to damages actions. See, *e.g.*, *Bertoli* v. *SEC*, No. 77 Civ. 1450 (S.D.N.Y. Nov. 4, 1977) (reprinted at Stafford Pet. App. 32a-36a); *Kenyatta* v. *Kelley*, 430 F. Supp. 1328 (E.D. Pa. 1977); *Writers Guild of America* v. *FCC*, 423 F. Supp. 1064, 1159 (C.D. Cal. 1976) (dicta); *Rimar* v. *McCowan*, 374 F. Supp. 1179 (E.D. Mich. 1974); *Davis* v. *Federal Deposit Insurance Corp.*, 369 F. Supp. 277 (D. Colo. 1974). Contra, *Ellingburg* v. *Connett*, 457 F.2d 240 (5th Cir. 1972); *Lowenstein* v. *Rooney*, 401 F. Supp. 952 (E.D.N.Y. 1975); *Wu* v. *Keeney*, 384 F. Supp. 1161 (D.D.C. 1974). Some courts also have relied on Section 1391(e) to provide venue of damages actions in the place where the claim arose. See, *e.g.*, *Patmore* v. *Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975). This is unnecessary, because Section 1391(b) allows any federal question case to be litigated where the claim arose.

Under the court of appeals' holding in *Colby* petitioners will be subjected to discovery and trial in Rhode Island because one of the respondents lives there. Nothing that is at all relevant to respondents' complaint took place there, and the petitioners have no connection with that district. The complaint could as well have been filed in Alaska or Hawaii or New Mexico; indeed, because the mail opened in New York was bound for many states, petitioners could have been sued in Alaska *and* Hawaii *and* New Mexico. Each of those federal districts has as much connection with the litigation as Rhode Island does. In *Stafford* the complaint was filed in the District of Columbia, even thought the events of which respondents complained took place in Florida and all of the defendants save one live there. As in *Colby*, the complaint could as well have been filed in any district where a plaintiff lived.

A "result * * * so eccentric," as Judge Friendly characterized it in *Natural Resources Defense Coun-*

cil, Inc. v. *TVA, supra,* 459 F.2d at 257, is contrary to longstanding principles of venue. "[V]enue is primarily a matter of convenience of litigants and witnesses." *Denver & R.G.W. R.R.* v. *Brotherhood of Railroad Trainmen,* 387 U.S. 556, 560 (1967). "Historically, venue has been geared primarily to the convenience of the defendant rather than that of the plaintiff since it is the defendant who is being brought into court." *Reuben H. Donnelley Corp.* v. *FTC,* 580 F.2d 264, 269 (7th Cir. 1978). And, "in terms of traditional venue considerations, * * * the most desirable forum for the adjudication of the claim * * * is in [the district] where all of the material events took place [and where] the records and witnesses pertinent to [the] claim are likely to be found," at least where that forum is "no less convenient" to the defendant than it is to the plaintiff. *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 493-494 (1973) (footnotes omitted).

Section 11 of the Judiciary Act of 1789, this nation's first venue statute, provided that "[N]o civil suit shall be brought * * * against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found * * *." Act of September 24, 1789, ch. 20, 1 Stat. 73, 79. Even this defendant-oriented provision resulted in abuse by plaintiffs who followed defendants to distant places to serve them, and so venue laws in 1887 and 1888 narrowed the provision to "permit[] civil suits to be instituted only in the district of which the defendant was an inhabitant, except that in diversity jurisdiction cases suit could be started in the district of the plaintiff's or the defendant's residence." *Stonite Products Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561, 563-564 (1942).

In federal question cases, venue remained limited to the district of the defendant's residence until 1966, when Congress provided that, in both diversity and federal question cases, suit also could be brought in the district in which the claim arose. Pub. L. No. 89-714, 80 Stat. 1111. To this day, an action not based solely on diversity of citizenship may not be brought in the district where the plaintiff lives, unless specifically provided by law.[36]

As this brief overview suggests, statutes allowing a plaintiff to bring suit where he resides, without regard to where the claim arose or where the defendant resides, are exceptional—so exceptional that this Court has refused to allow plaintiffs to bring such suits when the statute they invoke appears to have been written with narrower ends in mind. *Robertson* v. *Railroad Labor Board,* 268 U.S. 619 (1925). The legislative history of Section 1391(e) indicates that Congress did not conclude that there was need for such an exceptional rule in damages actions against federal employees.

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[36] Such special provisions include 28 U.S.C. 1402 (suit against United States under Tucker Act may be brought where plaintiff resides); 28 U.S.C. 1398 (action to enjoin or suspend ICC order may be brought where any plaintiff resides or has its principal office). Cf. 28 U.S.C. 1391(d) (alien may be sued in any district; see *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.,* 406 U.S. 706 (1972)).

As we have discussed, Congress altered the anachronistic rule that had confined mandamus cases to the nation's capital, no matter how local the underlying dispute and no matter how inconvenient to the plaintiff litigation in the District of Columbia might be. Congress was influenced in its decision to change this situation by the fact that broadening venue in mandamus cases would not work hardship on the United States, because the actions were in essence against the United States, which was present and represented in each judicial district by the United States Attorney. H.R. Rep. No. 1936, *supra*, at 3; H.R. Rep. No. 536, *supra*, at 3; S. Rep. No. 1992, *supra*, at 3.

But this balancing of interests assumes that one side can benefit from changing the rules and the other side will not suffer. Such an assumption is valid for mandamus actions. They are essentially lawyers' actions, at least from the government's perspective. The committees acknowledged as much when they referred to the presence in each district of the United States Attorney, implying (and correctly so) that his presence would alleviate most inconvenience to the government in mandamus suits. The committees did not mention the inconvenience caused to witnesses and government officials, presumably because they recognized that mandamus suits normally do not require officials to participate. See *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). Mandamus cases test the lawfulness of particular acts. Facts often are stipulated or undisputed, and as

a result factual controversy takes a back seat to legal issues. Indeed, the government often declines to contest the reviewing court's jurisdiction under the mandamus statute because it is more interested in obtaining a decision on the legality of its policies than in arguing about which court should hear the case. See *Christian* v. *New York Department of Labor*, 414 U.S. 614, 617 n. 3 (1974); *United States* v. *Testan*, 424 U.S. 392, 401 n. 5 (1976). This impersonal approach is possible because the official whose acts are being reviewed is in no personal jeopardy. Public questions, not individual liability, are at stake.

Damages actions against government officials personally are an entirely different matter. The alleged liability may arise from something the defendant did while wearing his government official's hat, but from the day the complaint is filed the suit is no different from a private damages action. The defendant's personal funds are in jeopardy. Like a motorist in an auto collision case or a surgeon in a malpractice action, he has every motivation to dispute facts, to put the plaintiff to his proof, to raise any collateral matter that the law allows and the official perceives as serving his interests, regardless of its connection to his official acts or even to the merits of the dispute. The litigation is not a judicial review of his official acts but a threat to his personal finances, his reputation and his peace of mind. It cannot be left at the office when the defendant goes home for the night.

He fights the action. He plans strategy in consultation with the lawyers defending him. He is deposed.

He must answer interrogatories. He is, in short, haled into court like any other citizen might be to answer for his actions, and the seriousness of the litigation is not even slightly diminished because he is (or once was) on the government's payroll. There is no reason why the identity of his employer should subject him to suit in some far away place that is outside the scope of federal question venue under Section 1391(b).[37] Public duties may have provided the opportunity to infringe another's rights, and the official may wrongfully have done so, but plaintiffs in such cases have access to the same venue rules as those in any federal question case, and the official should have the benefit of those rules. The official is defending his person, not merely some public policy.

If Congress had specifically (albeit perhaps unwisely) prescribed that the venue rules be changed to the substantial advantage of the plaintiff in a damages action against a government official, it would

[37] 28 U.S.C. 1404(a), which authorizes a district court "[f]or the convenience of parties and witnesses, in the interest of justice," to transfer an action to any other district in which it might have been brought, does not adequately meet these concerns. Because "§ 1404(a) operates on the premise that the plaintiff has properly exercised his venue privilege" (*Van Dusen* v. *Barrack*, 376 U.S. 612, 634 (1964) (footnote omitted)), the burden is on the defendant to show that transfer is appropriate, and the plaintiff's choice "should not be lightly disturbed." 1 J. Moore, *Federal Practice* ¶ 0.145[5], at 1616 (1974 ed.). What is more, it is nearly impossible to obtain review of an erroneous decision not to transfer a case, because the decision is interlocutory. Some circuits refuse to review such a decision at all, and the other circuits allow review by mandamus only if there is a clear abuse of discretion. *Id.* at ¶ 0.147.

be his bad fortune. See note 1, *supra*. But Congress has not spoken with such clarity. This Court is being asked to infer that Congress intended a departure from conventional rules of venue in a situation where such a departure makes no sense. It should decline the invitation. The provisions of 28 U.S.C. 1391(a) and (b) perform very well in all sorts of private disputes, as Congress intended that they should. They represent Congress' judgment of what is fair, and they are readily available to these respondents. Section 1391(e), on the other hand, is so out of harmony with traditional principles of venue that this Court should hold that it applies only in the special cases for which it was designed and for which it works fairly.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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MARCH 1979

APPENDIX

September 25, 1962

Honorable David E. Bell
Director, Bureau of the Budget
Washington, D.C.

Dear Mr. Bell:

In compliance with Mr. Hughes' request, I have had examined a facsimile of the enrolled bill (H.R. 1960) "To amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the United States district courts, and for other purposes."

As indicated by the Committee Reports (H. Rept. No. 536 and S. Rept. No. 1922) the purpose of the bill is to make it possible to bring original actions in the nature of mandamus against Government officials and employees in all United States district courts. Such actions at present can be brought only in the United States District Court for the District of Columbia.

The Department's report of February 28, 1962 on this bill as passed by the House July 10, 1961 is set forth in the Senate Committee Report. In that report the Department questioned the wisdom of authorizing district courts generally to mandamus Cabinet officers and other Government officials. However, and without recommending legislation in this field, the Department submitted revised language to accomplish the stated purpose of the legislation. The Senate adopted some of the Department's suggestions but

the bill as amended and passed by the Senate on September 6, 1962 remained objectionable primarily because the language chosen to effect its purpose was susceptible to varying interpretations which it is believed could have resulted in the creation of a remedy quite different from mandamus.

Upon further consideration of this legislation, the Department concluded that it could support the enactment of the bill if the language of proposed section 1361 was modified to show clearly that the purpose of the bill was to do nothing more then to extend to all United States district courts jurisdiction in mandamus actions. The Department suggested language to effect this purpose and except for the omission of the word "of" preceding the language "any agency", the language of the enrolled bill is identical with that suggested by this Department. The omission of the word "of" is not regarded as of sufficient importance to warrant withholding approval of the bill.

While we believe that this bill should not be read as doing more than giving effect to the Congressional purpose to extend the mandamus jurisdiction of the District Court for the District of Columbia to other district courts throughout the country, there are portions of the legislative history which could suggest a broader grant of power. Accordingly we suggest that the President may wish to issue an announcement at the time he signs the bill making it clear that he considers the limited purpose controlling. An appropriate form of such statement is attached for your convenience.

The Department of Justice recommends approval of this measure.

Sincerely yours,

NICHOLAS DEB. KATZENBACH
Deputy Attorney General

IMMEDIATE RELEASE OCTOBER 5, 1962

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I have today signed H.R. 1960 which corrects an historic anomaly in the jurisdiction of the United States courts. While the bill creates no new remedies, it will extend to all district courts the same jurisdiction heretofore enjoyed solely by the District Court for the District of Columbia to hear actions in the nature of mandamus against Government officials. Thus it will no longer be necessary for citizens throughout the country to come to the District of Columbia to maintain actions against government officials.

JOHN F. KENNEDY

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